SUPREME COURT, U. S.

MAR 31 1967

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No. ~~1109~~ 56

In the

Supreme Court of the United States

OCTOBER TERM, 1967

INTERSTATE CIRCUIT, INC., et al.,

Appellants,

v.

CITY OF DALLAS,

Appellee.

On Appeal from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas.

MOTION TO DISMISS

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On Appeal from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas.

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the ground that it does not present a substantial federal question, or if the Court deems that there is a substantial federal question, Appellant's first question sought to be reviewed was not timely and properly raised.

JURISDICTION

This Appellant, Interstate Circuit, Inc., has presented three questions in its jurisdictional statement. No jurisdiction exists to review the decision of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, because none of the questions as presented by Appellant represents a substantial federal question. Additionally, the first question raised by Appellant was not timely and properly raised. The Dallas Motion Picture Classification Ordinance, both on its face and as applied to the Appellant, does not violate any rights guaranteed by the United State Constitution.

QUESTIONS PRESENTED

1. Whether the prompt final judicial decision as provided by the Dallas Motion Picture Classification Ordinance is a sufficient safeguard against constitutional infirmities?

2. Whether the Dallas Motion Picture Classification Ordinance provides sufficiently definite standards for the classification of motion pictures, or whether obscenity, which receiyes no protection under the Constitution of the United States and as such can be totally prohibited, is the only basis for classifying motion pictures?

3. Whether or not the facts and the evidence support the Dallas Motion Picture Classification Board, the trial Court, and the Court of Civil Appeals in their determination that the motion picture, "VIVA MARIA," should be properly classified as "not suitable for young persons"?

STATUTES INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States and the Dallas Motion Picture Classification Ordinance, City of Dallas Ordinance No. 11,284, Appellant's Appendix B.

STATEMENT

The Dallas Motion Picture Classification Ordinance, City of Dallas Ordinance No. 11,284 (Appellant's Appendix B Page 5), sought to be enforced in this case does not totally deny the exhibition of any motion picture to anyone. It is not a censorship ordinance. It is a classification ordinance. It does regulate the conditions under which young people under the age of sixteen (16) years may see a film, which has been classified as "not suitable for young persons"; that is, if the film has been so classified, the young person must be accompanied by his parent, guardian, husband or wife. The Dallas Classification Ordinance contains absolutely no provision which would prohibit the exhibition of any motion picture.

Appellant, Interstate Circuit, Inc., is an Exhibitor of commercial motion pictures. In compliance with the Dallas Motion Picture Classifiication Ordinance, Appellant filed a letter dated January 24, 1966, requesting the motion picture "VIVA MARIA" to be classified as "suitable for young persons". This request was considered by the Classification Board on January 25, 1966, and the Board requested a screening of this film. After viewing the film on February 7, the Board, in its open public hearing of February 9, determined that the motion picture "VIVA MARIA" should be

properly classified as "not suitable for young persons". The Exhibitor was notified of the Board's action by letter dated February 9, 1966, and the Exhibitor notified the Board of its non-acceptance of the Board's classification by letter dated February 11, 1966. As required by this Classification Ordinance, on February 14, 1966, within three (3) days of the Exhibitor's notice of non-acceptance, the City of Dallas petitioned the Dallas District Court for a temporary and a permanent injunction to enjoin this Exhibitor from exhibiting and advertising the motion picture "VIVA MARIA" without classifying it as "not suitable for young persons". The case was set for a hearing on February 17, 1966, and the City of Dallas offered to have it heard on either a temporary or a permanent injunction. The Exhibitor refused the offer to have the case heard on a permanent injunction. The case was heard as a trial de novo and not as an appeal from an Administrative Order or Decision. The City of Dallas carried the burden of proving that the motion picture was in fact "not suitable for young persons". After hearing the evidence and viewing the entire film, the trial Court found that the motion picture "VIVA MARIA" was in fact "not suitable for young persons" and entered its judgment on February 18, 1966, enjoining the Appellant from exhibiting or advertising the film contrary to that finding.

The trial Court's decision in this case was appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, and after the submission of briefs by all the parties, the Appellate Court viewed the entire film, heard oral arguments, and rendered its judgment and a writ-

ten opinion on April 5, 1966, *Interstate Circuit, Inc., et al. v. City of Dallas*, 402 S.W. 2d 770, writ of error refused. It is from this judgment and opinion by the Court of Civil Appeals that this Appellant is appealing.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

(1) The Dallas Motion Picture Classification Ordinance, both on its face and as applied in this case, provides the Exhibitor, the Appellant herein, a prompt judicial determination in compliance with the requirements as set forth in *Freedman v. State of Maryland*, 380 U.S. 51. Although the Freedman case dealt with the complete prohibition of the exhibition of a motion picture under the Maryland *Censorship* Statute, as opposed to *classification* of motion pictures under the Dallas Ordinance, the record in this case is abundantly clear that a prompt judicial review was afforded the Exhibitor.

The Court of Civil Appeals spoke to the issue of prompt judicial review in its opinion on this same case, stating on page 774 (Appellant's Apendix A, Page 8):

> "The case now before us was filed in the trial court February 14, 1966, tried February 18, 1966, submitted to this Court March 28, 1966 and decided April 5, 1966. Appellants surely have no real basis to complain that the judicial procedural timetable has been inadequate to meet the requirements set out in the Freedman case."

As pointed out, Appellant received a final, speedy judicial determination in the trial Court within one (1) week. Appellant received a judgment and opinion from the Court of Civil Appeals within seventeen (17) days from the date of

filing its brief with the Court. (Interstate's Brief filed in Court of Civil Appeals on March 19, 1966, and the Court of Civil Appeals' Judgment and Opinion rendered on April 5, 1966, Appellant's Appendix C, pages 1 and 2.)

Section 46A-7 of the Dallas Motion Picture Classification Ordinance, entitled "Judicial Review" (Appellant's Appendix B, Page 16), sets forth the provisions for a prompt judicial review and determination required under the Ordinance. The City of Dallas *must* comply with these provisions in order to enforce the Ordinance. The Ordinance itself provides that unless this strict timetable is compiled with, the Board's classification is suspended (Section 46A-7(b), Appellant's Appendix B-19). Either the Exhibitor gets its speedy judicial review or it may exhibit the film without classification. The requirements for Constitutional safeguards as set out by this Court in the *Freedman* case are obviously complied with by the provisions for judicial review in the Dallas Ordinance.

As pointed out above, the Dallas Ordinance not only provides for a prompt judicial determination as to whether or not the motion picture is properly classified; but, in addition, the ordinance demands that the City of Dallas cooperate with the Exhibitor in its effort to obtain a speedy appeal, if requested to do so. Even though the City of Dallas was not requested to do so, it cooperated with the Exhibitor at every step in its effort to obtain a speedy appellate review, and Appellant in this case admits this cooperation. (Appellant's Jurisdictional Statement, Page 8).

The City of Dallas agrees with Appellant where it states that *Jacobellis v. State of Ohio*, 378 U.S. 184, stands for the principle that the Supreme Court must view the subject matter in censorship cases to make an independent judgment as to whether it is obscene or constitutionally protected; however, the *Jacobellis* case and other censorship cases are dealing with the *total prohibition* of the subject matter. There is absolutely no provision in the Dallas Classification Ordinance for the prohibition of the exhibition of any motion picture or the prohibition of the dissemination of any material. The Ordinance does provide for the classification of motion pictures. As opposed to a censorship statute, the Dallas Ordinance does not attempt to tamper with anyone's work product, nor his right to speak or make a motion picture, but only to classify adult entertainment as such. Thus the distinction between this case and the *Jacobellis* case is abundantly clear.

The Appellant's argument that the Supreme Court of Texas relied on *Janus Films, Inc. v. City of Fort Worth*, 358 S.W. 2d 589, to avoid a decision in this case is wholly speculative. The Court merely found no reversible error in the decision of the Court of Civil Appeals and thereby made its independent decision.

(2) The Dallas Motion Picture Classification Ordinance does not prohibit the free exhibition of motion pictures, and the standards for classification of motion pictures as provided by the Ordinance are not vague and indefinite. Not being a censorship ordinance which would totally prohibit the exhibition of motion pictures, the Dallas Ordinance does

not attempt to determine whether or not a motion picture is obscene.

In drafting this classification ordinance, the City of Dallas has attempted to follow the language and decisions of this Court. In the *Jacobellis* case, *supra*, at page 195, this Court stated:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population * * * to reading only what is fit for children.' *Butler v. Michigan*, 352 U.S. 380, 383, 1 L. Ed. 2d. 412, 414, 77 S. Ct. 524. *State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.*" (Emphasis ours)

In *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, this Court held that the state has an interest in the welfare of children and that even the family itself is not beyond regulation in the public interest. This Court pointed out in *Bantam Books v. Sullivan*, 372 U.S. 58, 70, that a system of prior restraint would be tolerated if conditions of proper "judicial superintendence" and "an almost immediate judicial determination of the validity of the restraint" were met, and these conditions have been met by the Dallas Ordinance.

Again in *Kingsley Books v. Brown*, 354 U.S. 436, this Court pointed out that the liberty of speech is not an absolute right with no limitations whatever.

Even in obscenity cases, this Court has not required impossible standards but only that there be a sufficiently definite warning measured by common understanding and practices, *United States v. Petrillo*, 332 U.S. 1, 7, and *Roth v. United States;* 354 U.S. 476. Again in *Beauharnais v. Illinois*, 343 U.S. 250, 264, this Court held that the law was not so "ill defined" that men acting under a statute and judges and juries in applying it could not draw from it some adequate standards to guide them. This same reasoning was used by this Court in *American Communications Association v. Douds*, 339 U.S. 382, 412, when this Court stated:

> "* * * The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important."

The City of Dallas has aimed its legislation at young persons under the age of sixteen (16) and has drafted its standards for classification in accordance with the decisions of this Court.

Appellant makes reference to the case of *Interstate Circuit, Inc., et al. v. City of Dallas*, 249 Fed. Supp. 19 (Northern District of Texas), which was affirmed by the United States Court of Appeals for the Fifth Circuit in *Interstate Circuit, Inc., et al. v. City of Dallas*, 366 Fed. 2d 590, both cases holding that the Dallas Motion Picture Classification Ordinance was constitutional but limited the standard for classifying films to those that were obscene when viewed by an audience of young people. The lower Federal Courts did recognize the doctrine of variable obscenity; however,

the City of Dallas has filed a Petition for Writ of Certiorari, *City of Dallas v. Interstate Circuit, Inc., et al.*, Cause No. 978,[1] requesting this Court to sustain the classification standards as set forth in the Dallas Ordinance. In this regard, if there be a substantial Federal question as to the validity of the classification standards of the Dallas Motion Picture Classification Ordinance, that question could be properly resolved by this Court by granting the Writ of Certiorari already pending before this Court.

(3) Appellant's third question deals with several questions of fact. These questions were presented to both the trial Court and the Court of Civil Appeals, and after viewing the entire movie, both Courts, based on independent findings and conclusions, decided that the motion picture "VIVA MARIA" was in fact "not suitable for young persons".

Normally, this Court will not exert its jurisdiction to review questions of fact. *Grayson v. Harris*, 267 U.S. 352, 358; *Portland R. Co. v. Railroad Commission*, 229 U.S. 397, 412; *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160.

Appellant attempts to convince this Court that "sacreligious" was a basis for classifying the motion picture "VIVA MARIA", and has taken some testimony of Mr. John Gilliland, a Board member, out of context in an effort to prove this. A reading of Mr. Gilliland's entire testimony (State-

[1] Interstate Circuit, Inc., et al., a number of motion picture Exhibitors in Dallas and parties to the above referenced case decided by the United States Court of Appeals for the Fifth Circuit, also filed a Petition for Writ of Certiorari in a proceeding styled *Interstate Circuit, Inc., et al. v. City of Dallas*, Cause No. 971.

ment of Facts, page 11 through page 51) clearly reveals that the basis for the classification by the Board was "sexual promiscuity". There is no testimony that the Board discussed "sacreligious" conduct in its determination of the classification of this picture. Mr. Gilliland specifically denied considering it, and it is mere conjecture that anyone else considered sacrilege (Statement of Facts, page 38, lines 18 and 19, and Appellant's Appendix C, Page 15).

When Reverend Maceo limited the contemporary community standard to the City of Dallas, he may have been mistaken. However, he based his opinion on the young people he knew and worked with, and there is no reason to assume that objectionable material would be more or less detrimental to young persons within the City of Dallas than in other parts of the country. The record is devoid of evidence that other Board members limited the contemporary community to the City of Dallas.

These arguments were urged in the trial Court and the trial Judge was adequately apprised of the appropriate Supreme Court decisions and the Court made the independent finding that the motion picture "VIVA MARIA" was in fact "not suitable for young persons".

Additionally, the trial Court found that there were two or three features, *not scenes*, that would make the picture unsuitable for young people. It is obvious he was referring to the sexually promiscuous conduct which ran throughout the entire film.

All of these fact questions were urged and argued before the Court of Civil Appeals at Dallas. After hearing oral

arguments, reviewing all the evidence, reading the briefs submitted by all parties, and viewing the entire film, the Court of Civil Appeals found that the motion picture "VIVA MARIA" was in fact "not suitable for young persons", with full knowledge of the holdings of this Court.

Thus, it is respectfully submitted that the Dallas Motion Picture Classification Ordinance, both on its face and as applied in this case, does not offend the First and Fourteenth Amendments to the Constitution of the United States.

APPELLANT'S FIRST QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY AND PROPERLY RAISED

No jurisdiction exists to review the decision of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas with regards to Appellant's first question dealing with the prompt final judicial review.

On Page 6 of Appellant's Jurisdictional Statement, Appellant states that in its answer and cross-action filed in the trial Court it alleged that the Dallas Motion Picture Classification Ordinance did not provide a prompt final judicial determination. Appellant has included this portion of its answer in Appendix C, Pages 10 and 11. Although no findings of fact and conclusions of law were rendered, the trial Court obviously ruled against the Appellant on this point because it granted the injunction as sought by the City of Dallas.

However, in its appeal to the Court of Civil Appeals, the Appellant did not assign as error the trial Court's adverse ruling to its contention of no prompt judicial review,

but the Court of Civil Appeals did expressly answer the question of prompt judicial review in its opinion on Page 774 (Appellant's Appendix A, Page 8).

Notwithstanding this express ruling by the Court of Civil Appeals, Appellant again abandoned its contention of no prompt judicial review in its Motion for Rehearing to the Court of Civil Appeals. Again, Appellant failed to properly assign as error this question decided adversely to it, but this time in the face of an expressed and unequivocal adverse ruling by the Court of Civil Appeals. The Texas Rules of Civil Procedure require proper assignment of error in the Motion for Rehearing in the Court of Civil Appeals as a prerequisite to appeal to the Supreme Court of Texas by Application for Writ of Error. Texas Rules of Civil Procedure, Rule 469(c)[2].

[2] Texas Rules of Civil Procedure—Rule 469:
Requisites of Application for Writ of Error.

"The fact that the docket of the Supreme Court is overcrowded makes it imperative that applications for writs of error be as brief as possible. The attorneys are urged to cooperate with the Court in this respect, in order to reduce the work of the Court. The respondent is urged to file a reply.

"The application for writ of error shall be addressed to 'The Supreme Court of Texas', and shall state the name of the party or parties applying for the writ. The parties shall be designated as 'Petitioner', and 'Respondent'. The application shall contain the following:

* * *

"(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court."

In its Application for Writ of Error submitted to the Supreme Court of Texas, Appellant again failed to assign error to the Court of Civil Appeals' decision that the Dallas Ordinance did provide a prompt judicial review, both on its face and as applied in this case. Thus, the Appellant has failed to properly perfect its appeal under the Texas Rules of Civil Procedure as to whether the Dallas Ordinance provides a prompt judicial review, *Moore v. Dilworth*, 179 S.W. 2d 940 (Sup. Ct.); *East Texas Motor Freight Lines v. Loftis*, 223 S.W. 2d 613 (Sup. Ct.).

Not only is Appellant required to timely assert the federal question, but it is also required to pursue it throughout the litigation in all steps of appeal. It is not proper to present it to the highest State Court for the first time on a Petition for Rehearing. *Hanson v. Denckla*, 357 U.S. 235, 243-4; *Herndon v. Georgia*, 295 U.S. 441, 443; *American Surety Co. v. Baldwin*, 287 U.S. 156; *Forbes v. State Council*, 216 U.S. 396; *Simmerman v. Nebraska*, 116 U.S. 54.

CONCLUSION

The decision of the Texas Court of Appeals as set forth in Appendix A, Pages 1 through 21, of Appellant's Jurisdictional Statement, which was in effect affirmed by the Supreme Court of Texas by that Court's denial of Appellant's Application for Writ of Error, is in all respects cor-

rect, and upon that opinion and for the foregoing reasons, Appellant's appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Motion to Dismiss has been served upon Mr. Grover Hartt, Jr., and Mr. Edwin Tobolowsky, Attorneys for Appellant, Interstate Circuit, Inc., by delivering the same to them in their offices located at 3525 Southland Center, Dallas, Texas, and Mr. Dan McElroy and Mr. Paul Carrington, Attorneys for Appellant-Intervenor, United Artists Corporation, by delivering the same to them in their offices located at 1900 Mercantile Dallas Building, Dallas, Texas.

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